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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 569

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Petitioners and Cross-Respondent,

—against—

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of WALTER JOSEPH HALECKI, deceased, and ANNA HALECKI, Administratrix of the Estate of WALTER JOSEPH HALECKI, deceased,

Respondent and Cross-Petitioners.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners and Cross-Respondent,

—against—

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of Walter Joseph Halecki, deceased, and Anna Halecki, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Respondent and Cross-Petitioners.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Cross-petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on July 22, 1960.

Opinions of the Court Below

The opinion of the United States Court of Appeals for the Second Circuit in the first appeal following a verdict for plaintiff is reported at 251 F. 2d 708 (1959). The opinion of the United States Supreme Court reversing and remanding is reported at 358 U. S. 613, 79 S. Ct. 503, 3 L. ed. 2d 541 (1959).

Following a second trial and a jury verdict in favor of the defendant, a second appeal was taken to the United States Court of Appeals for the Second Circuit, which reversed and remanded in an opinion reported at 282 F. 2d 137 (1960). The judgment of the United States Court of Appeals is also set forth in the appendix to the Petition of the defendant.

Jurisdiction

The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of New Jersey and the defendant a New York corporation.

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 22, 1960. Petition for Rehearing and Petition for Hearing *En Banc* were denied on October 3, 1960. The defendant has filed its petition for certiorari on November 28, 1960.

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254 (1).

Questions Presented

Whether or not, in view of the new, undisputed evidence produced at the retrial of the action to the effect that the work performed by the deceased had been traditionally performed by seamen, he was entitled to a seaworthy vessel as a matter of law?

Whether or not, where the only ground for reversal on the first trial of this action was subsequently proved to be erroneous as a matter of law, the original verdict should not be reinstated?

Statement of Facts

This action had originally been tried before the Honorable EDWARD WEINFELD and a jury and resulted in a verdict of $65,000 (1a). On appeal to the United States Court of Appeals for the Second Circuit the judgment was affirmed with a dissenting opinion by Chief Judge LOMBARD. Judge LEARNED HAND writing for the majority interpreted the New Jersey Wrongful Death Act as applied in a case involving death on the navigable waters of the United States and held that the deceased had a right to a seaworthy vessel and that in addition the defendants had a duty under the facts in the case to provide a reasonably safe place to work and had a duty to exercise reasonable care to ascertain the methods and manner in which certain work with a dangerous substance was being carried on during the period of the work (6a). In addition, the Court held that the doctrine of comparative negligence applied (10a, 11a). Judge LOMBARD dissented, stating that in his opinion the deceased was not entitled to a seaworthy vessel because "he was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed" (16a). Judge LOMBARD also dissented from the view that comparative negligence rather than contributory negligence would apply (18a). However, he agreed that a cause of action based on negligence existed and would have remanded for trial on that issue only (19a). The United States Supreme Court granted certiorari and in a 5-4 decision reversed and remanded. Mr. Justice STEWART, writing for the majority cited the above quoted language in the dissenting opinion of Judge LOMBARD (24a) and held that the warranty of seaworthiness would not have applied in an

action by the deceased in this accident if he had not died (24a). On the issue of negligence, Mr. Justice STEWART stated "we agree with the Court of Appeals that the evidence created an issue that could be decided only by a verdict. The defendants owed a duty of exercising reasonable care for the safety of the decedent" (25a). Furthermore, the majority upheld the determination of the Court of Appeals that comparative negligence rather than contributory negligence was the test (21a). The judgment was vacated and the case remanded for a new trial (25a).

At the retrial, the following was established by the evidence:

On September 29, 1951, a vessel known as the "New Jersey" was tied up in the navigable waters of the United States at Jersey City, New Jersey (134a, 135a, 148a). The vessel was owned and operated by the defendant (135a).

The vessel was brought to this location by its own crew where an enterprise known as Rodermond Industries was located (135a). The master of the vessel testified that, while the vessel was moored, he was "on board every day during working hours" (136a). Working on board during this period were the master, some deck men and the full complement of engineers and engine room crew (138a). The deck men had "a certain amount of deck work to do, like painting and fixing up minor repairs, a general overhaul of the deck department, renew lines," etc. (137a). The engineers and engine room crew took care of "maintaining the engines and any other specific work" they had to take care of (138a). During the working week, and on some weekends, at least one engineer slept on board the vessel (139a). The master would remain on board at night "two or three nights a week" (139a). The vessel also maintained a deck watch (140a). In addition, Mr. Goetz, the defendant's marine superintendent, would go "around the vessel to see that the different jobs were being done," (140a).

The work done was described as "annual overhaul" (145a). The master testified (145a):

> "Q. To your knowledge was it done under any orders of any members of the Pilot Association? A. Under the orders of the marine superintendent.
>
> Q. When you say under the orders of the marine superintendent, you mean in accordance with the specifications? A. That's correct."

The pertinent part of the specifications provides that the crew was to remove and replace cylinder heads for the port and starboard generators (212a). However, the contractor, among other things, had to (212a):

> "Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order."

Donald Doidge, who was the foreman for K & S Electrical Company, gave orders to the deceased who assisted him (46a, 78a). Mr. Doidge testified that he, the decedent, and two other men, had worked on the vessel during the week before on "general repairs, renewing cable, working around different controls" (47a). During this period, the ship's crew also worked on the vessel (47a). He testified that he and the chief engineer on the vessel went over the specifications to determine which was the best time to do the spray cleaning (48a). The chief engineer suggested that the work be done on a Saturday when there would not be any other work done on the vessel (49a). This was suggested because of the dangerous nature of carbon tetrachloride, a fact known to the chief engineer (49a). Among other things, Mr. Doidge testified (70a):

> "A. * * * As I say, if it is on board the ship we have to consult the chief engineer. In other words, he is responsible when the job is done, we have to get it checked with the chief engineer and get it okayed be-

fore he will sign for the completion of the work. So we have to consult with the chief engineer all the time."

The witness testified that Rodermond Industries didn't have anyone qualified to check on the electrical work and that it was all up to the chief engineer of the vessel who was "acquainted with the electrical work" (71a). He was asked on cross examination (75a):

"Q. Did the chief engineer have anything to do with the manner in which you performed your work? A. Well, literally speaking, yes, for the simple reason he is the boss and if he sees anything that is wrong he would tell you about it.

Q. If your work was done contrary to the specifications or if it didn't meet with his satisfaction he could tell you to correct it, is that right? A. That's right, yes."

Mr. Doidge also testified (64a):

"Q. If it didn't specify here carbon tetrachloride would you have used carbon tetrachloride or a substitute? A. Do you mean if it wasn't in the specifications? I think we would go to the substitute.

Q. Why is that? A. For the simple reason it is safer to work with and not as much danger to it.

Q. Then can you tell us the reason why you used carbon tetrachloride on the particular job? A. Because it is specified in the specifications."

On redirect this witness also testified (89a):

"Q. With respect to see that the vessel is properly ventilated for the work that you had to do, who was that up to? A. That is hard to say. If the engineer was on board the ship, it would be up to him. But in this case I was there on Saturday by myself, so there was nobody to consult, so I do it on my own.

Q. But if the engineer was there to consult with you, it would be up to the chief engineer to see that it is properly ventilated? A. He was the boss on the ship, yes."

Donald Doidge, the foreman of the deceased, testified concerning the circumstances under which the deceased worked just prior to his injury and death. On the day before the accident both Doidge and the deceased had obtained air hoses and an exhaust blower from the storeroom of Roderniond Industries (50a). The blower and air hoses were brought on board the vessel the day before, on a Friday (50a). The chief engineer was on board while this was being done (50a). The next day no one was on board except the man on watch and Doidge and the deceased (53a). They started about 8 o'clock in the morning. First of all, Doidge started the generator on shore "That energizes the ship switchboard" (53a). Then they rigged the air hoses (54a). They started working with the carbon tetrachloride spray at about 8:30 A.M. and finished at about 3:30 P.M. with half an hour out for lunch (56a).

The spraying took about six hours (57a). Doidge had hurt his hand the day before, so that the deceased did all the spraying himself with some help from Doidge (57a).

After the work was finished, the deceased left complaining of a "peculiar taste in his mouth" (62a). The deceased passed away a few days later. Dr. Gnassi who performed an autopsy stated that the deceased died of "carbon tetrachloride poisoning" (103a). An engineering expert, Gerald J. Horvitz who has been connected with New York Testing Laboratories for 40 years, and is also a graduate chemical engineer testified (110a). He had physically examined the engine room of the defendant's vessel (112a). He testified that carbon tetrachloride is 5.3 times heavier than air (115a). He stated that it was a dangerous chemical when taken into the system by humans (115a). He said that this was common knowledge in industry in 1951 (115a).

The maximum allowable concentration has been set at 100 parts per million (115a). He computed that 8 gallons of carbon tetrachloride used in the confined spaces of the engine room in six hours would produce 12,000 parts per million (117a). He stated that a chemist could have computed in advance how much ventilation was required (117a, 127a).

He estimated on the basis of a hypothetical question that the ship's equipment together with the other equipment used would reduce the concentration approximately 20%. In his opinion the ventilation was inadequate (120a). The concentration was unsafe and was about 96 times the allowable safe concentration (123a). He stated that the type of gas mask used would not be effective for more than half an hour (125a). There were safer substitutes available as cleaning agents in 1951 (125a). He also stated that the usual procedure if a vessel goes to the shipyard is that the owner specifies in his contract that a chemist's report be made up of the inspection of the vessel with regards to safe working conditions (127a, 128a).

The court below ruled prior to the start of the case that the plaintiff could produce "additional facts" on the status of the deceased but that if the facts produced were the same as at the first trial he would exclude the issue of unseaworthiness as a matter of law (35a).

The plaintiff produced Stanley Tenusiak, a chief engineer working on tugboats for the Pennsylvania Railroad. He started going to sea in 1933 at the age of 15 (104a, 105a). He had not testified at the first trial. He was licensed as a chief engineer of steam and motor vessels of any horsepower with endorsements as electrician, water tender, fireman and oiler (104a). He sailed on tankers, freighters, passenger ships and tugboats (105a). He stated that he was qualified to clean generators and that they do this on the railroad vessels weekly (107a). He said that at one time they did use carbon tetrachloride to clean genera-

tors but discontinued using it in 1946 (107a, 108a). He stated specifically that cleaning generators was and is a seaman's job (108a), and that the work of overhaul is done sometimes by the ship's crew and sometimes by the shipyard (110a).

The defendant made a motion to dismiss at the end of the plaintiff's case which was denied (149a). The court also ruled that the additional evidence of Mr. Tennsiak didn't make any difference, and therefore the issue of unseaworthiness was out of the case (150a). The court also denied motions made at the end of the case (166a, 171a).

The trial court refused to use the language of the Court of Appeals or of this court in charging the standards to be applied in determining negligence (167a, 168a, 170a, 202a, 208a). The trial court charged that "control" of the work done by the deceased was essential to a finding that the shipowner had any duty toward the deceased (178a, see also 177a, 179a, 180a, 201a, 204a). The trial court also commented, "However, the evidence is undisputed that they did not supervise the work" (178a). The verdict for defendant which resulted was reversed by the Court of Appeals. The court agreed with plaintiff's contention that the charge of the trial court was "tantamount to the direction of a defendant's verdict" (Pet. 27). On this ground the judgment was reversed and the case remanded. However, the court did not find error in the refusal to send the question of unseaworthiness to the jury and therefore did not pass on plaintiff's contention that the first jury verdict should have been reinstated.

Reasons for Granting of Writ

1. The shipowner has filed his petition in this case seeking a writ of certiorari. The plaintiff contends that the questions set forth in the petition of the shipowner are not of such importance as to warrant the granting of the writ since they cover matters already decided by this court.

We therefore oppose granting of the shipowner's petition. However, we wish to present for decision important and novel questions of law which were decided adversely to plaintiff by the United States Court of Appeals.

2. This court in the majority opinion in prior decision rendered in this case held (24a):

> "* * * *The basic fact* is, in the apt words of Judge Lombard's dissenting opinion in the Court of Appeals, that the decedent was not doing what any crew members had ever done on this ship or anywhere else in the world *so far as we are informed*! * * * (Italics ours)

At the retrial of this matter the plaintiff proved by undisputed evidence that this was work traditionally done by seamen *as a matter of fact*. A witness who had been going to sea since 1933, was a licensed chief engineer, and had served on all types of vessels testified that prior to 1946 or 1947, he and other seamen had cleaned generators with carbon tetrachloride on vessels as part of their duties and that they still clean generators on vessels (106a *et seq.*). The trial court stated that the new evidence did not change the essentials of this issue and consequently, refused to submit the unseaworthiness issue to the jury (150a, 197a).

In view of the new undisputed evidence, which established factually that the cleaning of ship's generators, including cleaning with carbon tetrachloride, was work traditionally done by seaman, the prior decision of this court, which stated that the deceased was not entitled to a seaworthy vessel was not controlling and should not have been followed. See *De Parcq* v. *Liggett & Myers Tobacco Co.*, 81 F. 2d 777 (8 Cir. 1936) cert. den. 298 U. S. 689, 56 S. Ct. 947, 80 L. Ed. 1400 (1936); *Bondy* v. *Harvey*, 62 F. 2d 521 (2 Cir. 1933) cert. den. 289 U. S. 740, 53 S. Ct. 659, 77 L. Ed. 1487 (1933). In the majority opinion, this court had left open the question of whether the status of the vessel was such as would deprive the deceased of a right

to a seaworthy vessel (24a, ftn. 7). This question has been answered in favor of those in the position of the decedent in *Lavior* v. *Socony-Vacuum Oil Co.*, 275 F. 2d 599 (2 Cir. 1960), —— U. S. ——, 80 S. Ct. 1614, 4 L. Ed. 2d 1728 (1960). The issue of whether a shore-based worker is entitled to a seaworthy vessel where the evidence establishes factually that he is doing work traditionally performed by seamen is an important question which deserves consideration by this court.

3. The only ground for reversal in the prior decision of this court in the majority opinion was error in submitting the issue of unseaworthiness to the jury (25a). The matter was determined as a question of law. At the retrial, on the basis of undisputed evidence it was established that the deceased was doing work traditionally done by seamen. He would have been entitled to a seaworthy vessel. Therefore, the alleged error in the first trial turns out to have been based on an error of law based on an error of fact which was subsequently corrected. The defendant has had a fair trial already on *all* issues. What would be the purpose of a further trial? The jury verdict in the first trial should be reinstated since it represents an adjudication on all issues properly involved in this action. In view of the new fact established in this case, this court should exercise its powers to dispose of this case as justice may require and reinstate the original verdict for plaintiff. *Cf. State Tax Commission of Utah* v. *Van Cott*, 306 U. S. 511, 515, 59 S. Ct. 605, 57 L. Ed. 608 (1939).

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this cross-petition.

Dated: December 6, 1960.

Respectfully submitted,

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Respondent and Cross-Petitioners.

BRIEF IN OPPOSITION TO CROSS PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO CROSS PETITION FOR WRIT OF CERTIORARI

Counter Statement of Questions Presented

Whether a question which was decided with finality by the Supreme Court of the United States can be re-opened by the introduction of alleged new evidence, when the same facts were before the Court upon the first appeal?

Whether the occasional performance of a particular job by seamen can be a basis for finding that the work was "traditionally or customarily" done by seamen?

ARGUMENT

When this case was first before the United States Supreme Court, a decision in favor of the plaintiff was reversed, and a new trial was specifically ordered to be on the sole issue of negligence. In a majority opinion by Mr. Justice Stewart, 358 U. S. 613, it was held that Halecki did not do the type of work traditionally done by the ship's crew, and that he was not entitled to the warranty of seaworthiness.

In spite of this ruling, the plaintiff's attorneys attempted to bring this element back into the case at the second trial, through the testimony of Stanley Tenusiak, an alleged expert witness on behalf of the plaintiff. Mr. Tenusiak's testimony (p. 104A-109A), was ostensibly introduced to demonstrate the proper use of carbon tetrachloride. However, this witness attempted to testify that this type of work, had, in his experience, been done by seamen.

When the nature of this testimony became apparent an objection was made, and the Trial Court ruled that the testimony was irrelevant because the issue of unseaworthiness had been removed from the case by the United States Supreme Court. This issue was again raised by the plaintiff as an appellant before the United States Court of Appeals for the Second Circuit which rejected the attempt to resurrect the issue of unseaworthiness as follows, 282 F. 2d 137 (page 139):

> "Plaintiff on the retrial attempted to fortify her position to the effect that the work done by the deceased was traditionally performed by seamen. The trial court, however, ruled that the essential facts were the same as on the first trial and, relying on the

> Supreme Court's rejection of the warranty of seaworthiness contention, refused to send this question to the jury. With this decision we agree. The case was thus submitted solely on the negligence count."

The plaintiff-respondent by means of a cross petition for a Writ of Certiorari now attempts to again bring this issue before the Supreme Court of the United States on the ground that Mr. Tenusiak's testimony brought an element into the case which was not before this Court upon the original appeal.

However, the history of this case discloses that the attorneys for this plaintiff have consistently argued, throughout all stages of the previous appeal, that the decedent was doing seaman's work: The briefs filed by the plaintiff, as appellee in the previous appeal, as respondent in opposition to the petition for Writ of Certiorari, and as respondent in the appeal before the Supreme Court of the United States, devoted extensive space to this aspect of the argument.

Nor was the plaintiff's position confined to a review of legal authorities on the point. Strong reliance was placed upon factual material in an attempt to demonstrate to the Supreme Court that the decedent was doing seaman's work. At page 21 of the respondent's brief filed with the Supreme Court of the United States, in opposition to the first appeal, counsel quoted extensively from proceedings under Merchant Marine Counsel, United States Coast Guard, with regard to the use of carbon tetrachloride aboard vessels. Reference was also made to the Collective Bargaining Agreements with Maritime Unions, which list electricians as a classification of maritime employment.

Accordingly, it is apparent that this issue was placed squarely before the Supreme Court of the United States, and the testimony of witness, Tenusiak, has added no element which was not present during previous stages of this litigation.

As pointed out by Mr. Justice Stewart in the original opinion of this Court, this decedent's work was so foreign to the work "ordinarily" performed by the ship's crew that it could only be done when the ship was dead and at a time when the crew members were not on the vessel. It seems obvious that testimony by Mr. Tenusiak that in his experience seamen had on occasion performed the same type of work does in no way affect the validity of this Court's finding upon the first appeal.

It appears almost facetious to argue that the decedent's work became "work traditionally done by seamen" by relying upon the testimony that the witness knew of occasions when a seaman performed this job.

Undoubtedly, testimony could be obtained to the effect that seamen have on occasion used riveting and welding equipment but this obviously would not extend the warranty of seaworthiness to shipyard employees performing structural repairs upon a vessel in a shipyard.

There appears to be no need to enumerate the numerous lower Court decisions which have cited and relied upon the finding of this Court in *Halecki* v. *Pilots Association*, 358 U. S. 613. We shall refer to only one case, which was also cited by the cross-petitioner, and shall quote briefly from the opinion of Circuit Judge Medina in *Laulor* v. *Socony Vacuum*, 275 F. 2d 599 (Ca-2, 1960), Cert. den., 4 L. ed. 2

1728. Here the Court granted the warranty of seaworthiness after finding that the plaintiff was doing seamen's work, and it is significant to note the language used by Circuit Judge Medina at page 603:

> "True it is that if the injured shore-base worker was engaged in work not *traditionally or customarily* performed by members of the crew of the vessel as turned out to be the case in Halecki, there could be no recovery for unseaworthiness."

It is respectfully contended that the use of the words "traditionally or customarily" which are found throughout the relevant opinions, clearly reject the cross-petitioner's argument that an occasional performance of a particular job renders it traditional seamen's work.

CONCLUSION

The cross Petition for Certiorari should be denied because the issue presented has already been officially decided by this Court.

Respectfully submitted,

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